No. 7243

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a Corporation, by E. B. BENN, Its Receiver,

Appellant,

vs.

J. G. GRUVER, and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

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First National Bank Bldg.,
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STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Southern Division, in favor of defendants.

Upon written stipulation of the parties, the cause was tried before the court without a jury and special findings of fact were made by the court. It is the contention of the appellant that the judgment in favor of the defendants is not supported by the facts found, but that on the contrary such facts show that the plaintiff is entitled to recover judgment as prayed for in its complaint.

The facts found by the Trial Court, together with its conclusions of law therefrom, are as follows:

FINDINGS OF FACT.

I.

That the First National Bank of Kelso, Washington, at all times mentioned in plaintiff's complaint, was a banking corporation duly organized and existing under and by virtue of the national banking laws of the United States of America and that on the 23rd day of December, 1931, said bank was closed and placed in charge of the Comptroller of Currency of the United States; that on the 29th day of December, 1931, E. B. Benn, was by the

Comptroller of Currency of the United States of America duly appointed receiver of the First National Bank of Kelso, Washington, and immediately qualified as such receiver and took possession of said bank, its assets and property and is and was at all times mentioned in plaintiff's complaint, the duly appointed, qualified and acting receiver of and for said bank, and was duly authorized to begin and prosecute the above entitled cause.

II.

That the above named defendant J. G. Gruver was at all times mentioned in plaintiff's complaint, the duly elected, qualified [30] and acting auditor of Cowlitz County, State of Washington; and that the defendant, The American Surety Company of New York, a corporation, was at all times mentioned in plaintiff's complaint, the bondsman on defendant Gruver's official bond as such county auditor, which said bond was, at all times mentioned in plaintiff's complaint in full force and effect.

III.

That the said defendant J. G. Gruver in the course of his official duties as county auditor of Cowlitz County, Washington, was required to and did collect certain moneys belonging to said Cowlitz County, consisting of marriage license fees, and fees for hunting and fishing licenses for said county, and

that these monies thus collected are the only monies belonging to Cowlitz County which the defendant Gruver retained in his possession.

IV.

That the said defendant Gruver as county auditor was also required to and did receive applications for motor vehicle licenses for the State of Washington, and on behalf of the state collected the fees for such licenses at the time applications were made, for the same, and in addition to the amount of the license fees thus paid, the auditor charged a fee of twenty-five cents for each application, and that such additional fee thus charged belonged to said Cowlitz County to be turned over to the county treasurer of said county; that in receiving applications and collecting the fees for motor vehicle licenses, the said defendant Gruver acted as agent for the State of Washington and the funds so received by him belonged to the State of Washington and were to be remitted daily to the state treasurer of said state.

V.

That the defendant Gruver as part of his official duties [31] as county auditor, at all times mentioned in plaintiff's complaint, issued hunting and fishing licenses for other counties throughout the State of Washington and the fees thus received for such

licenses belonged to such other counties and were remitted to said counties at varying intervals, and where the funds received for such licenses were not remitted immediately, the same were held in the office of the said county auditor of Cowlitz County until the remittances were made.

VI.

That at all times set out in plaintiff's complaint, the said defendant Gruver as county auditor had two checking accounts in the plaintiff bank; one called trust fund account in which only monies received from marriage license fees were deposited and the other called the game fund account, in which only funds received for hunting and fishing licenses from Cowlitz County were deposited, and these two accounts constituted the only accounts that the defendant Gruver had in said bank.

VII.

That for a period of at least six months prior to the closing of said plaintiff bank, it was the custom of said defendant Gruver, as county auditor, to make the remittances of automobile license fees to the state treasurer by draft drawn by the plaintiff bank on the First National Bank of Seattle, and that the remittances to other counties for hunting and fishing licenses issued for such other counties were likewise made by drafts drawn by the plaintiff

bank upon other banks.

These drafts were in every instance purchased by the defendant Gruver as county auditor of Cowlitz County and paid for in currency, silver and checks at the time the same were [32] issued, and that in no instance were any of such drafts purchased or paid for out of the funds which had been on deposit in the bank and in no instance were any of the motor vehicle license funds or outside county hunting and fishing license funds deposited in the bank except the currency, silver or checks deposited by said auditor at the time of receiving the plaintiff bank's draft for same.

VIII.

That during the period from April 1, 1931, to October 1, 1931, the daily balance which said defendant Gruver as auditor had on deposit with said plaintiff bank in the game fund amounted to from $800.00 to $1,800.00 and the average daily balance in said bank in the trust fund account amounted approximately forty dollars.

IX.

That on the 9th day of April, 1931, the plaintiff bank turned over to the defendant Gruver certain school warrants of the total face value of $1503.98 and the terms and conditions under which said

school warrants were turned over to the defendant were set forth in a written instrument which reads as follows:

"Office of
J. G. Gruver,
County Auditor,
Court House,
Kelso, Washington. April 9th, 1931.

RECEIVED of The First National Bank, Kelso, Washington, as security for Cowlitz County funds deposited by me, and to be deposited by me, in such bank, various School District warrants as follows:

School Dist. No.	Warrant No.	Bank's No.	Amount
127	6	2119	$125.00
127	10	2123	123.00
127	16	2122	175.00
127	17	2125	143.00
127	26	2130	150.00
127	29	2137	123.00
127	34	2132	100.25
			[33]
127	40	2153	116.75
127	47	2120	111.00
127	54	2126	87.75
127	64	2146	99.00

School Dist. No.	Warrant No.	Bank's No.	Amount
127	67	2124	99.00
127	81	2121	10.00
127	108	2151	41.23

Total—Fifteen Hundred Three & 98/100 Dollars $1,503.98

Dated at Kelso, Washington, April 9th, 1931.

(Sig.) J. G. Gruver, County Auditor.

It being agreed by and between said plaintiff bank and said defendant Gruver that such warrants were to protect all funds coming into his hands as County Auditor and deposited by him in said bank as such auditor.

X.

That on December 17, 1931, the defendant Gruver as auditor purchased from the plaintiff bank a draft on the First National Bank of Seattle, in the sum of $10.50 payable to the auditor of Skamania county, Washington, and a similar draft in the sum of $1.50 payable to the auditor of Clark county, Washington; and that these drafts were paid for in cash and represented funds received by the defendant Gruver for hunting and fishing licenses issued by him for Skamania and Clark Counties respectively.

XI.

That on December 21, 1931, the defendant Gruver had on hand the sum of $833.00 in the form of silver, currency and checks which had been received by him as auditor in payment of automobile license fees for the state of Washington, and on that date he purchased from the plaintiff bank two drafts drawn on the First National Bank of Seattle and payable to the treasurer of the state of Washington, one being for the sum of $533.00, and the other for the sum of $300, and that these drafts were paid for by the said defendant Gruver in silver, currency and checks. [34]

That at all times the various drafts herein mentioned were issued, plaintiff bank had sufficient funds or credit in the First National Bank of Seattle to pay the same and the same would have been paid had it not been for the closing of plaintiff bank prior to the time the drafts were presented for payment.

XII.

That the last date upon which plaintiff bank did business was December 22, 1931, and that the Comptroller of Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation, and that at the time of the closing of said bank as aforesaid, the defendant Gruver as auditor had on de-

posit in the said bank in the trust fund account and in the game fund account a total balance of $57.71 together with interest thereon amounting to $.70 making a total of $58.41.

XIII.

That after the closing of the plaintiff bank and on or about the 28th day of December, 1931, the defendant Gruver, as auditor, sold the school warrants which had been deposited with him receiving in payment therefor the sum of $1568.59, and after deducting therefrom the amount represented by the balance of his deposit in the trust fund and game fund accounts together with the amount of the drafts herein referred to, tendered the balance amounting to the sum of $680.38 to the Examiner in charge of plaintiff bank, which tender was refused by the Examiner and demand made upon the defendant Gruver for the sum of $1510.18, being the balance of the proceeds of said warrants after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of said plaintiff bank, And that after the commencement of this action, the said defendant Gruver as auditor has tendered into [35] Court the sum of $680.38, the same having been paid to plaintiff pursuant to the terms of the stipulation entered into between the parties, and the funds received by said auditor from said bank immediately co-mingled

with the bank's other funds.

Done at Tacoma this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,
Judge.

From the foregoing facts found, the court concludes as follows:

CONCLUSIONS OF LAW.

I.

That the said defendant J. G. Gruver was acting as an officer and agent of Cowlitz County, Washington, at the time he collected and received the fees referred to and set out in the Findings of Fact herein, and that as between the State of Washington and the Counties of Clark and Skamania, the monies thus collected by the said defendant Gruver belonged to the State of Washington or to the Counties of Clark and Skamania according to their respective rights as between Cowlitz County and plaintiff bank at the time they were received by plaintiff bank, they were county funds of said Cowlitz County.

II.

That in purchasing the drafts, referred to in the Findings of Fact herein set out, by the said de-

fendant Gruver as auditor of said county, and paying for same with funds representing license fees collected by said defendant Gruver as such county auditor, such funds were deposited with said plaintiff bank upon the delivery of same to said bank and title thereto passed to said plaintiff bank and said bank became a debtor of Cowlitz County in the event of the non-payment of the draft or drafts issued by said plaintiff bank.

III.

That defendant Gruver as county auditor had the right to sell the school warrants deposited with him by plaintiff bank and to deduct from the proceeds received from such sale monies on deposit in said plaintiff bank belonging to Cowlitz County deposited therein by said defendant Gruver as County Auditor and to deduct therefrom the face value of the several drafts referred to in the Findings of Fact herein and to pay the balance of such monies received from the balance of said school warrants to the person or persons in charge of the affairs of said plaintiff bank lawfully entitled to receive same, and that such payment has been made by said defendant Gruver pursuant to a stipulation on file herein.

IV.

That defendants are entitled to a judgment of dis-

missal herein with costs taxed in their favor. [36]

ASSIGNMENTS OF ERROR.

I.

The court erred in ruling in paragraph No. 1 of its conclusions of law (Tr. 43) that the defendant, J. G. Gruver, was acting as an agent and officer of Cowlitz County, Washington, at the time he collected and received the fees for automobile licenses and in ruling that said fees, and the fees collected by said defendant for hunting and fishing licenses for Clark and Skamania counties, were Cowlitz County funds.

II.

The court erred in ruling in paragraph No. 11 of its conclusions of law (Tr. 43) that the purchase of the drafts referred to in the findings of fact herein constituted a deposit.

III.

The court erred in ruling in paragraph No. III of its conclusions of law (Tr. 44) that the defendant had the right to sell the school warrants deposited with him as security and to deduct therefrom the face value of the several drafts referred to in the fiindings of fact herein.

BRIEF OF ARGUMENT.

I.

The defendant, Gruver, at the time he collected the

fees for automobile licenses was the agent of the State of Washington and the fees so collected belonged to the State of Washington and not to Cowlitz County.

Secs. 6314-6316-6317-6327-6330-6360 and 4218, Remington's Revised Statutes of Washington.

State vs. Cowlitz County, 146 Wash. 305;

State vs. Asotin County, 79 Wash. 634;

Smith vs. Seattle School District No. 1, 112 Wash. 64.

II.

The fees collected by the defendant Gruver for hunting and fishing licenses for the counties of Clark and Skamania were not Cowlitz County funds.

Secs. 5884 &5896, Remington's Revised Statutes of Washington.

III.

The purchase of the drafts payable to the Treasurer of the State of Washington and to the auditors of Clark and Skamania counties did not constitute a deposit in the plaintiff bank.

Kidder vs. Hall, 251 S. W. 497; 7 Corpus Juris, 485;

Lankford vs. Schroeder, L. R. A. 1915 F, 623; 3 R. C. L. 516-522.

IV.

Property pledged to secure a particular debt cannot be appropriated to the payment of any other debt or obligation.

21 R. C. L. 653; 49 Corpus Juris, 936; 49 Corpus Juris, 972;

Reynes vs. Dumont, 130 U. S. 345, 32 Law Ed., 934;

Hanover Nat. Bank vs. Suddath, 215 U. S. 110, 54 Law Ed. 115;

Armstrong vs. Chemical Bank, 41 Fed. 234.

V.

Defendant's claim for the amount of the drafts purchased by him cannot be set up by way of recoupment, set-off or counterclaim in the present action.

Scott vs. Armstrong, 146 U. S. 499; 57 C. J. 396, 421 & 426.

Mansfield vs. Yates-American Machine Company, 153 Wash. 345;

In Re Bevins, 165 Fed. 434; Fidelity & Deposit Co. vs. Haines, 23 L. R. A. 652; United States Fidelity & Guaranty Company vs. Wolldridge, 268 U. S. 234; 34 Cyc, 194.

ARGUMENT.

I.

The warrants involved in this action were de-

livered by the Bank to the defendant under a written agreement set forth in paragraph numbered nine of the Court's findings of fact (Tr. 39), which written agreement recites that they were given "as security for Cowlitz County funds deposited by me, and to be deposited by me in such Bank."

The first question that arises, therefore, is whether or not the funds used by the defendant in purchasing the drafts constituted "Cowlitz County funds."

The funds which were used by the defendant in the purchase of the drafts payable to the Treasurer of the State of Washington represnted money collected by him for state motor vehicle licenses and such funds unquestionably were funds belonging to the State of Washington, and Cowlitz County had no interest whatsoever therein.

The law of the State of Washington with respect to the licensing of motor vehicles and the collection of fees therefor, insofar as is material in this case, may be found in the following sections of Remington's Revised Statutes of Washington.

> "The secretary of state, acting through the county auditors of the several counties of the State of Washington as hereinafter provided, shall have the general supervision of the issuing of motor vehicle licenses and of the collecting of

fees therefor" * * * **Sec. 6314, Remington's Revised Statutes of Washington.**

The duties imposed upon the secretary of state by virtue of the above section have since its enactment devolved upon the director of licenses of the State of Washington by the terms of Sec. 6360, which reads as follows:

"The director of licenses, from and after the time when he shall be appointed and qualified and assume and exercise the duties of his office, shall exercise all the powers and perform all the duties by this act vested in and required to be performed by the secretary of state, except the receiving of fees and moneys which shall, from that time, to be paid to the state treasurer who shall transmit his duplicate receipt therefor to the Director of Licenses." **Sec. 6360, Remington's Revised Statutes of Washington.**

It will thus be observed that the county auditor at the time he receives applications for motor vehicle licenses under the provisions of these sections is acting not as an agent of the county, but as an agent of the state of Washington.

"Application for a motor vehicle license shall be made to the secretary of state on blanks furnished by him." * * * **Sec. 6316, Remington's Revised Statutes of Washington.**

"Upon receipt of such application accom-

> panied by the proper fee, the county auditor shall give one copy to the applicant, retain one for the county files, and immediately forward the original, together with the proper fee, to the secretary of state." * * * **Sec. 6317, Remington's Revised Statutes of Washington.**

It is apparent from the section just quoted that it was the intention of the legislature that fees so collected by the county auditors should not be commingled with other fees or funds collected by them, but that the same was the property of the State of Washington and should be transmitted to the state immediately.

> "At the time any application is made to the county auditor for a license, as provided elsewhere in this act, the applicant shall pay to the county auditor the sum of twenty-five cents for each application, in addition to the license fee provided for in section 15 of this act, which fee shall be paid to the county treasurer in the same manner as other fees, collected by the county auditor and credited to the county current expense fund." **Sec. 6327, Remington's Revised Statutes of Washington.**

This section again makes plain that the fees so collected belong to the State of Washington and not to the various counties whose auditors may collect the same, since it specifically provides for an additional fee of twenty-five cents, which additional fee

does belong to the county and must be paid by the auditor to the county treasurer the same as other county funds collected by him.

> "There is hereby created in the state treasury a state fund to be known as the "motor vehicle fund." All fees collected by the state treasurer, as herein provided, shall be paid into the state treasury and placed to the credit of the motor vehicle fund." * * * **Sec. 6330, Remington's Revised Statutes of Washington.**

This section again plainly states that such fees belong to the State of Washington.

It is true that counties are political subdivisions of the state and in a sense agencies of the state for governmental purposes; nevertheless, both the legislature and the courts of the State of Washington have always recognized that the state and its various counties are separate entities insofar as their respective funds and property are concerned. This distinction was recognized by the Supreme Court of the State of Washington in the case of the **State of Washington vs. Asotin County, 79 Wash. 634,** which was an action brought by the state against the county to recover money alleged to be due from the county to the state. In this case the court held that under the facts set forth mandamus against the county commissioners was the proper action, but its opinion clearly indicates that there is a distinction

between state and county funds.

In the case of the **State vs. Cowlitz County, 146 Wash. 305,** the Court held that the state could maintain an action for a money judgment against the county. Counsel for appellant in this case was counsel for Cowlitz County. In that action the question of the right of the state to maintain an action for a money judgment against one of its own political subdivisions was squarely raised and presented to the state court. The fact that an action for a money judgment can be maintained by the state against the county clearly shows that county funds and county property are separate and distinct from state funds or state property.

Under the laws of the State of Washington the county treasurer is the custodian of all county funds and the county auditors are required to turn over to the county treasurers all fees collected by them by virtue of their office.

> "Every county officer, who, by the laws of this state is allowed a salary, shall, on the first Monday of each month, pay into the county treasury all moneys and sums which have come into his hands for fees and charges in his office, or by virtue of his office, during the preceding month. And no officer is permitted to retain to his own use or profit any sums paid him in his office or by virtue of his office, no matter from what

> source, but all of such moneys so paid him by virtue of the laws of this state, or of the United States, shall be the property of the county." **Sec. 4218, Remington's Revised Statutes of Washington.**

If it were to be held in this case that the fees collected by the county auditor for motor vehicle licenses belong to the county, then the express declaration of the legislature would be set at naught.

The learned Trial Court in his memorandum opinion seems to have based his conclusions, partly at least, upon the theory that the duty of collecting and remitting these fees was one which rested upon the counties and that the funds so collected therefor were county funds. There is, we believe, no foundation for such an assumption. The law plainly states that the duty of collecting such fees rests upon the director of licenses of the State of Washington, acting through the county auditors of the various counties. A county auditor occupies a dual capacity. He is not only an agent of the county but he is, also, by virtue of his office an officer and agent of the state itself.

> * * * "An officer whose duties are prescribed by statute, whose authority is not derived from the corporation, and who is not subject to its control, is not its agent for whose negligence it is liable. Shearman & Redfield on Law of Neg-

ligence (6th ed.), vol. 2, sec. 291; Northwestern Improvement Co. vs. McNeil, 100 Wash. 22, 170 Pac. 338; Township of Vigo vs. Com'rs Knox County, 111 Ind. 170; 12 N. E. 305; Dillon on Municipal Corporations (5th ed.), vol. III, sec. 974; Thompson on Negligence, vol. 5, secs. 5818 and 5822; Dillon on Municipal Corporations (5th ed.), vol. IV, secs. 1640 and 1655.

The county superintendent being, therefore, a public officer, and not a municipal agent or employee, whatever may be his liability in such case as this, the county has no liability under the maxim respondeat superior." * * * **Smith vs. Seattle School District No. 1, 112 Wash. 64.**

In this case if the county auditor had collected fees for automobile licenses and had neglected or refused to transmit the same to the state treasurer the county would be under no liability whatsoever to the state for such funds, but the state would have to look to the auditor himself or to his official bond for reimbursement. So, too, in such a case the county would have no interest whatsoever in the matter. It could not maintain an action against the auditor or his bondsmen to recover any monies so withheld. We believe that there can be no question but that the funds here in question did not constitute county funds and can under no circumstances be considered as being secured by the property pledged by the bank.

II.

With respect to the fees collected by the defendant for hunting and fishing licenses for the counties of Clark and Skamania, it is equally clear, we believe, that such fees did not belong to Cowlitz County. The power of the county auditor to issue such licenses and his duties with respect to the fees collected therefor are found in **Sections 5884 and 5896, Remington's Revised Statutes of Washington,** which read as follows:

> * * * "There is hereby established in each county treasury a fund to be known as the county game fund, which shall consist of ninety per cent (90%) of all moneys received in any county from the sale of county licenses and twenty per cent (20%) of all moneys received from the sale of state licenses and all moneys received from fines and costs for violations of this act. Such county game fund shall be used for the payment of the salaries and expenses of employees of the county game commission, and for propagation, protection, introduction, exhibition, purchase and distribution of game animals, fur-bearing animals, game birds, nongame birds or game fish." **Sec. 5884, Remington's Revised Statutes of Washington.**
>
> "Any county auditor shall have the power and authority to issue hunting and fishing licenses for any county of the state, and shall transmit the fees to the auditor of the county for which

> the license is issued at the close of each month's business, together with the record thereof" * * * **Sec. 5896, Remington's Revised Statutes of Washington.**

The defendant in this action in issuing and collecting fees for licenses in other counties was clearly acting as the agent of such other counties and not as the agent of Cowlitz County and the fees received for such licenses belonged to the other counties and not to Cowlitz County.

III.

As we have seen, the warrants involved were pledged by the bank as security for Cowlitz County funds "deposited by me, and to be deposited by me in such bank." We cannot see how by any stretch of the imagination the purchase of these drafts can be construed as a deposit in the bank. The term deposit is so well understood that so far as we have been able to discover no court has as yet found it necessary to make a legal definition of the term. The various characteristics of a deposit in a bank have, however, been passed upon many times and it is generally understood and held that a deposit consists of a sum of money placed in a bank to the credit of the depositor and subject to be withdrawn by him, or on his order, on demand. When we say that a man has funds on deposit in a bank we mean that he has placed in the bank money which the bank

will re-pay to him upon demand.

A general discussion of the creation of the relation of banker and depositor is found in **3 R. C. L. pp. 516 to 522.** In legal effect a deposit is a loan to the bank. It differs from an ordinary debt in that it is constantly subject to the checking of the depositor and always payable on demand. The consideration which the depositor receives for his money is the absolute and unconditional contract by the bank to pay his checks to the extent of his deposit. A deposit creates the relation of debtor and creditor between the bank and the depositor.

An entirely different situation exists between the purchaser of a draft and the bank from whom the same is purchased. It is true that a draft creates the relation of debtor and creditor, but a draft is a negotiable instrument and is drawn not upon funds in the drawer bank, but upon a credit which the drawer has in another bank, and the relation of debtor and creditor in this case did not exist between the bank and the defendant, but between the bank and the payee of the drafts. When the defendant in this case purchased the drafts in question he did not make a deposit in the bank, but he purchased the credit of the bank and title to this credit passed not to the defendant but to the payee of the drafts. No relation of debtor and creditor existed between the bank and the defendant Gruver until the drafts had been

dishonored and the relation then arose only by virtue of his payment to the state treasurer of the amount of the drafts and his consequent subrogation to the rights of the state treasurer as payee.

The distinction between a depositor and the holder of a check or draft has been clearly pointed out in cases arising under statutes providing for a depositors' guaranty fund. The authorities in such cases have held that in order to be entitled to payment of such fund the claimant must be a depositor as the term is generally accepted and understood. **7 Corpus Juris, p. 485; Lankgord vs. Schroeder, L. R. A. 1915 F., 623.** A rather thorough discussion of the subject is found in the case of **Kidder vs. Hall, 251 S. W. 497,** in which the court says:

> "Aside, however, from the technical question of jurisdiction, it is plain relator's claim is not based upon a noninterest-bearing and unsecured deposit, the only class of obligations protected by the depositors' guaranty fund. Revised Statutes, art. 486. The word 'Depositors' is to be given its generally accepted and understood meaning. 7 Corpus Juris, p. 485; Lankford vs. Schroeder, 47 Okl. 279, 147 Pac. 1049, 1053 L. R. A., 110 N. W. 538. A depositor is one who delivers to or leaves with a bank money, or checks or drafts, the commercial equivalent of money, subject to his order, and by virtue of which action the title to the money passes to the bank.

2 Michie on Banks and Banking, pp. 887 to 890, pp. 908, 909, and notes; Fleming vs. State, 62 Tex. Cr. R. 653, 139 S. W. 598, 600; Lankford vs. Schroeder, 47 Okl. 279, 147 Pac. 1049, 1052, L. R. A, 1915 F, 623; State vs. Corning State Bank, 136 Iowa, 79, 113 N. W. 600, 502.

"Various distinctions may be noted between the relationship created by the issuance and sale of a draft, and the receipt of a deposit by a bank. In the case of a deposit, the money is placed in the bank in reality for the benefit of the depositor (Elliott vs. Capital City State Bank, 128 Iowa, 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 1134, 111 Am. St. Rep. 198) while in the sale of a draft the transaction is for the benefit of the bank making the sale. When a deposit is made the bank receives assets, and the depositor has a direct claim against the bank; the relationship is one of primary liability, directly on the contract—while in the issuance of a draft the bank sells assets, and the primary liability is that of the bank against which it is drawn, and the issuing bank is not liable until payment has been refused by the drawee bank. See Texas Negotiable Instruments Act, tit. 1, arts. 5 to 8; Vernon' Ann. Civ. St. Supp. 1922, vol. 2, pp. 1772 to 1779; Harper vs. Winfield State Bank (Tex. Civ. App.) 173 S. W. 627.

"Another illustration may be given. Take the instance where money, belonging to another than the one making the deposit, is placed in a

bank without the consent of the owner. In such a case the relation of banker and depositor is not created: the bank does not take title to the fund, and, regardless of the innocent purposes of the bank, it is guilty of conversion. 2 Michie on Banks and Banking, pp. 897, 898, 899; Winslow vs. Harriman Iron Co. (Tenn. C h. App) 42 S. W. 698, 699; Mingus vs. Bank of Ethel, 136 Mo. App. 407, 117 S. W. 6683, 685; Board of Fire and Water Commissioners vs. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Patek vs. Patek, 166 Mich. 466, 131 N. W. 1101, 35 L. R. A. (N. S.) 461. See, also, Wilson vs. Wichita Co. 67 Tex. 647, 4 S. W. 67, and 3 Rose's Notes on Texas Rep. p. 810, and 1913 Supplement, p. 548. On the other hand, if one having the money of another goes to a bank and purchases a draft, and the bank innocently receives the money and issues a valid draft therefor, the bank becomes the owner of the money paid for the draft, regardless of the title which the purchaser may have had to the funds. Oklahoma State Bank vs. Bank of Central Arkansas, 120 Ark. 369, 179 S. W. 509, 511; First National Bank vs. Gilbert, 123 La. 845, 49 South, 593, 25 L. R. A. (N. S.) 6631, 131 Am. St. Rep. 382, an dcases cited in notes; State Bank vs. United States, 114 U. S. 401, 5 Sup. Ct. 888, 29 L. Ed. 149; Holly vs. Missionary Society, 180 U. S. 284, 293, 21 Sup. Ct. 395, 45 L. Ed. 531; 27 Cyc. pp. 863, 865.

"The illustrations show a clear distinction between the obligations and rights which arise

from contracts of deposit and of sale and purchase of drafts. Others might be stated, but we deem it unnecessary." **Kidder vs. Hall, 251 S. W. 497.**

IV.

As we have heretofore seen, the drafts for the payment of which the defendant seeks to hold the proceeds of the pledged property were not purchased with county funds, nor did the purchase of these drafts constitute a deposit in the bank. The question now arises as to whether or not the defendant can hold the pledged property, or the proceeds, for the payment of a debt or obligation other than that for which the security was given. The authorities on this question are so universally unanimous and the rule is so well known that we deem it hardly necessary to argue this point very extensively.

"Debts or Liabilities Secured.—A pledge to secure a specific debt cannot be held by the pledgee as security for any other obligation, whether such obligation exists at the time of the pledge or accrues afterwards, except by express agreement between the pledgor and pledgee. If the purpose for which the collateral security was given is expressed in writing, such writing is not subject to be varied or contradicted by parol evidence for the purpose of showing that the collateral may be held to secure some other in-

debtedness not mentioned in the writing.' * * * **21 R. C. L. 653.**

"Debts or Liabilities Secured.—a. In General. As to what debts or liabilities are secured by a pledge is controlled by the intention of the parties, as determined from the whole transaction between them; and where the contract, prepared by the pledgee, is not clear as to whether the collateral pledged shall secure a particular indebtedness, it must be construed in favor of the pledgor. It is a well settled rule, however, that, where the contract shows that the collateral or property is pledged as security, for a specific debt or liability, the pledgee has no lien upon it for a general balance or for the payment of other claims; and therefore the collateral or property so pledged cannot be appropriated by the pledgee to any other debt or liability of the pledgor, regardless of his insolvency," * * * **49 C. J. 936.**

A general discussion of this question may also be found in the following cases:

Reynes vs. Dumont, 130 U. S. 354, 32 Law Ed., 934;

Hanover Nat. Bank vs. Suddath, 215 U. S. 110, 54 Law Ed. 115;

Armstrong vs. Chemical Bank, 41 Fed. 234.

V.

The next question that arises is whether or not the

defendant has the right to set up by way of recoupment or set-off in this action any claim he may have by reason of the non-payment of the drafts. If such claim is merely a general claim against the bank, which it undoubtedly is, then unquestionably the same cannot be set up by way of recoupment, set-off or counter-claim in this action.

Assuming for the moment that the circumstances existing at the time of the purchase of these drafts were such as to entitle the defendant to a preferred claim in the receivership proceedings, it is, we believe, well established that such claim cannot be set up by way of recoupment, set-off or counter-claim in the present action. This is an action at law and is based upon the conversion of certain property by the defendant, which conversion took place subsequent to the suspension of the bank and subsequent to the time the same was turned over to the Comptroller of the Currency for the purpose of liquidation. The right of set-off or counter-claim was unknown in common law and exists purely by virtue of statute. So far as we have been able to discover there is no statute in the United States which confers the right of set-off or counter-claim in an action at law, and the Supreme Court of the United States has expressly held that a District Court of the United States sitting as a court of law cannot permit an equitable set-off or counter-claim in an action at

law, even though under the code of procedure for the state in which the Court is sitting such equitable defenses may be pleaded in actions brought in the state court.

> "Section 913 of the Revised Statutes in providing that the practice, pleadings, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction **between law and equity as under the Constitution matter of substance,** as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, **nor are equitable defenses permitted.** Bennett vs. Buterworth, 52 U. S. 11 How. 669 (13:859); Thompson vs. Central Ohio R. Co. 3 U. S. 6 Wall. 134 (18:765) Scott vs. Neely, 140 U. S. 106 (35:358); Montejo vs. Owen, 14 Blatchf, 324; La Mothe Mfg. Co. vs. Natural Tube Works Co. 15 Batchf, 432.
>
> We are of opinion that the circuit court had no power to grant the set-off in question in the suit at law." **Scott vs. Armstrong, 146 U. S. 499.**

It is, therefore, at once apparent in view of the

rule in the above case that the claims of the defendant in this action cannot be allowed unless it would be on the theory of recoupment, which is the only defense of this character recognized in actions at law in the United States courts. The right of recoupment, however, exists only in cases where the facts constituting the defense arise out of the same transaction as that upon which the plaintiff's action is based.

> "Sec. 49. F. **Arising Out of Transaction — 1. Necessity and Propriety—a. Recoupment.** In recoupment defendant's claim must arise out of the same contract or transaction as that on which plaintiff's cause of action is founded, or be connected with the subject of the action. Thus, if defendant's claim springs out of the contract or transaction on which plaintiff seeks recovery, it may be recouped, but defendant cannot recoup for matters not connected with the subject matter of plaintiff's claim, and which are founded upon an independent and distinct contract or transaction." **57 Corpus Juris, p. 396.**

In this case, as we have seen, the plaintiff's cause of action arises out of, and is based upon, the conversion of its property by the defendant. The warrants which were converted were turned over to the defendant prior to the time the drafts were issued and the conversion took place after the insolvency of the bank and after the drafts had been dishonored

for that reason. There certainly cannot be said to be any connection whatsoever between the issuance of the drafts and the conversion of the warrants; they were entirely separate and distinct transactions.

Moreover, even in those courts in which the defenses of set-off and counter-claim are allowed by virtue of statutory provisions the rule is well settled that set-offs or counter-claims arising by virtue of contract cannot be allowed in actions arising out of a tort.

> "In accordance with the general rule that excludes set-off in actions sounding in tort, in the absence of statutes permitting it, a claim on a contract is not allowable to defendant as a set-off to a claim based on a tort; and this applies to claims founded on implied contracts as well as express ones." **57 Corpus Juris, 421.**

> "Where it arises out of the transaction upon which plaintiff's cause of action is based, or is connected with the subject of plaintiff's action, a demand based on contract may be counter-claimed against a claim founded on tort, but where these essential requisites are absent, such a counter-claim is improper, and thus counter-claims ex contractu have been disallowed in actions for conspiracy, conversion, fraud, negligence, trespass, wrongful arrest, or for wrongful diversion of a stream. Where plaintiff's action sounds in tort, no counter-claim can be al-

> lowed under a statute permitting the counter-claiming of any demand arising out of contract, in an action based on a contract. Nor can a contract be the basis of a counter-claim in a tort action under a statute allowing defendant, in an action sounding in tort, to counter-claim a similar cause of action." **57 C. J. 426.**

Moreover, the cause of action upon which the claim of the plaintiff in this case is based did not come into existence until after the insolvency of the bank and after it had been taken over by the Comptroller of the Currency for liquidation. The rule is well settled in cases of this kind that the rights of the receiver, or other officer who has been placed in charge of an insolvent corporation, and the rights of the creditors or debtors of such corporation with respect to off-sets and counter-claims are fixed and determined at the time the act of insolvency occurs and that no creditor can obtain a preference over the other creditors by appropriating any of the property of the corporation subsequent to the occurrence of the act of insolvency, and in case any creditor shall convert or appropriate to his own use property of an insolvent corporation after the appointment of a receiver he is liable in an action for conversion and he cannot set up the indebtedness owing to him by the corporation as a defense in an action brought by the receiver for the recovery of the property or the value thereof.

"Appellant also claims the right to off-set against the judgment obtained in this action the balance due it from the corporation on account of the purchase price of the machines. It must be remembered, however, that the receiver in this case represents the creditors, and the claim of the receiver in this action is a claim arising subsequent to his appointment and because of goods converted from him, clearly distinguishing the situation from that in the North Side State Bank vs. United States Fidelity & Guaranty Co., 127 Wash., 342, 220 Pac. 822, the case relied upon by appellant. To permit the appellant to off-set in this action would be to grant to the appellant all the rights which he might have obtained had his conditional sales contract been held good and valid. Cases, seemingly squarely in point on this phase of the situation, which hold that the set-off will not be allowed, have been examined, among them being: McQueen vs. New(86 Hun 271, 33 N. Y. Supp. 395; Singerly vs. Fox, 75 Pa. St. 112; Rochester Tumbler Works vs. Mitchell Woodbury Co., 215 Mass., 194, 102 N. E. 428; Washburn Water Works Co. vs. City of Washburn, 218 N. W. (Wis.) 825.

We find no error in the record. The judgment is therefore affirmed." **Mansfield vs. Yates-American Machine Co., 153 Wash. 345.**

See, also, **In re Bevins, 165 Federal 434, Fidelity & Deposit Co. vs. Haines, 23 L. R. A., 652**; also, **United States Fidelity & Guaranty Company vs. Wool-**

dridge, 268 U. S. 234.

If any cause of action in favor of the defendant exists by reason of the non-payment of the drafts in controversy, the same accrued and came into existence at the time of the closing of the bank, or at least not later than the time the drafts were presented and payment refused. At that time the receiver of the bank or the Comptroller of the Currency had no cause of action against the defendant and the defendant was not indebted to the bank in any manner whatsoever. No cause of action in favor of the bank or its receiver arose until approximately a week after the closing of the bank, at which time the act of conversion took place.

> "While the cases are not entirely harmonious on this subject, yet upon the principle last stated, and because the receiver can acquire no greater interest than the debtor had in the estate, the general rule may be said to be that the appointment of a receiver does not affect a right of set-off **then existing**; choses in action pass to him subject to the equitable right of **set-off** then existing, so that a debtor of the insolvent who has such right is not bound to pay what he owes and take his chances with the other creditors, but is bound to pay only the balance. But the right of set-off in such cases exists only to the extent of the concurrence of the two claims. No lien can be obtained against the receiver for any

excess due defendant, and to entitle a debtor of an insolvent corporation to offset his claim against the receiver in a case not provided for by the statute, his natural equity to have one claim compensate or discharge another must be superior to any equitable claim which can be urged in favor of those parties for whose benefit his claim to an equitable offset is resisted. **The debts must have been due to and from the same persons in the same capacity in order that the right of set-off may exist, and as against a receiver as the representative of the creditors of an insolvent, a claim against the latter cannot be set off, and where the receiver of a corporation** as the representative of creditors, repudiates an illegal transfer of corporate assets before his appointment, the transferee cannot set up a counter-claim arising out of his own illegal contract for money paid in pursuance of it. **Claims acquired after insolvency,** where the statute prohibits references and assignments after insolvency, or after the appointment of a receiver, cannot be set off against him. And where the rights of the receiver become fixed at the time of his appointment, the rights of creditors to an equal distribution of the assets of an insolvent cannot be disturbed by permitting a debtor to acquire a claim against the insolvent after the appointment of a receiver and to accomplish a set-off, this acquiring a preference to that extent, and the assignment of a claim against an insolvent corporation after the appointment of a receiver will not affect the receiver's right to

> set off against it claims which he holds against the assignor. So it is held that a claim against an estate before the receivership **cannot be set off against a claim accruing to the receiver after his appointment.**" * * * **34 Cyc. p. 194.**

From the authorities which we have hereinabove quoted it is, we believe, apparent that if the defendant has any claim by reason of the non-payment of the drafts involved in this action the same must be presented in the receivership proceedings and cannot be passed upon or allowed in this action.

In conclusion we submit:

1st. That the funds used by the defendant Gruver in purchasing the drafts payable to the Treasurer of the State of Washington and to the auditors of Clark and Skamania counties were not Cowlitz County funds and, therefore, not secured by the pledged property;

2nd. That the purchase of said drafts by the defendant Gruver did not constitute a deposit in the bank and that the sums paid for said drafts were, therefore, not secured by the pledged property;

3rd. That the warrants pledged to the defendant Gruver, or their proceeds, can be held only for the amount of money actually on deposit in the bank at the time of its closing and cannot be applied to the

payment of the indebtedness or obligation arising out of the dishonor of the drafts;

4th. That any claim against the bank arising out of the dishonor of the drafts must be presented to the receiver of the bank in the regular course of liquidation and cannot be set up by way of recoupment, set-off or counter-claim in this action.

Respectfully submitted,

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